LIM YEE TECK & ORS.

v.

SHELL (M) TRADING SDN.BHD.

PRIVY COUNCIL
LORD SCARMAN
LORD KEITH OF KINKEL
LORD BRIGHTMAN
LORD TEMPLEMAN
SIR JOHN MEGAW
[PRIVY COUNCIL APPEAL NO. 48 OF 1984]
17 JUNE 1985

LAND LAW: *Construction of agreement for sale of plot of land - Sections 135, 138 of National Land Code - Process of approval of sub-division - Title in perpetuity - Policy of Government - Specific performance.*

Shell (the respondent) were the registered proprietors with title in perpetuity of land held under grant number 9982 for lot number 162 Section 63 in Kuala Lumpur (hereinafter referred to as the "said land"). On part of the said land Shell erected a petrol filling station and wanted to sell the remainder of the land that was not required for the purposes of the petrol station. Pursuant to s. 138 of the National Land Code, Shell applied to the Collector of Inland Revenue for approval of the sub-division on 6 June 1972.

Shell then entered into an agreement with the appellants, on 29 December 1972, for the sale and purchase of the land not required by Shell for the purposes of the petrol filling station. On a reading of the agreement, for the sale to be carried out, it was necessary that there should be issued a title in perpetuity to the land being purchased by the appellants and a title in perpetuity to the site of the petrol filling station which was being retained by Shell.

By a letter dated 16 October 1973, the Collector informed Shell that approval would be granted to a sub-division resulting in a continuation of the title in perpetuity of Shell to the petrol filling station site. Shell then wrote to the Collector requesting for a title in continuation of the said petrol station site but this was turned down by the Collector as it was said to be against the policy of the Government. Shell then informed the appellants on 27 November 1973 that it had become legally impossible to sub-divide the land in accordance with the agreement after which Shell refunded to the appellants their earnest money (see Clause 6 which is reproduced in judgment).

On 11 July 1980, Wan Hamzah J (sitting in the High Court), granted the appellants an order for specific performance of the agreement dated 29 December 1972. On 24 March 1982, the Federal Court set aside the order of the High Court. The appellants then appealed to His Majesty the Yang di-Pertuan Agong with leave.

Held:

[1] It was not legally possible to sub-divide the land without the approval of the State Commissioner and this approval could not be obtained because the state authorities were only prepared to grant a thirty-year title to the site of the petrol filling station. Therefore, the agreement was at an end on 27 November 1973 when Shell returned the earnest money to the appellants.

[2] There is no merit in the argument of the appellants that Shell should have insisted that the Collector refer the application to the State Commissioner. It is clear from the correspondence that copies of all correspondence were sent to the State Commissioner who did not repudiate the policy statement communicated to Shell by the Collector.

[3] The appellants argued also that Shell could have accepted the conditions sought to be imposed by the Collector and could have surrendered their title in perpetuity in exchange for a thirty-year lease. Their Lordships rejected this contention because there would then have not been a sub-division of the land in accordance with the terms of the agreement because Clause 2 required that both parts of the original land should be issued with separate documents of title in continuation.

[4] The Government had no power to pursue a policy of insisting that a title in perpetuity to a petrol filling station should be surrendered in return for a thirty-year term (*Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise* [1979] 1 MLJ 135). However, on the facts of the present case, there is nothing in the agreement dated 29 December 1972 which obliged Shell to do more than make the necessary application for sub-division. Their Lordships declined to imply in the agreement or to impose an obligation on the part of Shell to bring proceedings as such an obligation whether express or implied would be thoroughly unreasonable.

[Appeal dismissed with costs.]

Case referred to:
Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprises [1979] 1 MLJ 135

Legislation referred to:
National Land Code 1965, ss. 135, 138

JUDGMENT

Lord Templeman:

This appeal involves a short question of construction arising out of an agreement dated 29 December 1972 whereby the respondent "Shell" agreed to sell to the appellants part of a plot of land at Kuala Lumpur.

Shell were the registered proprietors with title in perpetuity of land held under grant number 9982 for lot number 162 Section 63 in the town of Kuala Lumpur. On part of the land Shell erected a petrol filling station. Shell were minded to sell the remainder of the land not required for the purposes of the petrol filling station. Such a sale involved a sub-division of the title. By s. 135 of the National Land Code of Malaysia a registered title may be sub-divided but only with the approval of the State Commissioner, subject to certain conditions which Shell were able to satisfy. Accordingly on 6 June 1972 Shell duly applied, pursuant to s. 138 of the National Land Code, for approval of the sub-division between the petrol filling station site and the remainder of the land. The application was submitted, as required by the National Land Code, to the Collector of Inland Revenue. By s. 138 the Collector must refer the application to the State Commissioner of Lands and Mines, together with the recommendation of the Collector. The State Commissioner, if satisfied that the prescribed conditions are satisfied, shall approve the division.

The agreement dated 29 December 1972 recited that Shell were registered as the proprietor of the land held under grant number 9982 for lot number 162 Section 63 in the town of Kuala Lumpur in the district of Kuala Lumpur, defined as "the said land". Shell then agreed to sell

and the appellants agreed to purchase the portion of the said land marked on the plan annnexed to the agreement and comprising the portion which was not required for the petrol filling station. The agreement contained two clauses referring to sub-division as follows:

> 2. The vendor shall (if it has not already done so) make application to the appropriate authority or authorities for the sub-division of the said land so as to result in the issue of separate documents of title in continuation in respect of the said portion and in respect of the balance of the said land.
>
> 6. If for any reason sub-division is refused or for any other reason it shall not be legally possible to sub-divide the said land in accordance with the terms of this agreement then the vendor shall refund to the purchasers the earnest money referred to in Clause 1 hereof free of any interest whereupon this agreement shall be null and void and cease to have any further force or effect and neither party shall have any claim against the other in respect thereof.

In order therefore that the sale should be carried into effect, it was necessary that there should be issued a title in perpetuity to the land being purchased by the appellants and a title in perpetuity to the site of the petrol filling station which was being retained by Shell.

By a letter dated 16 October 1973 the Collector required certain conditions to be fulfilled by Shell before he forwarded the application for sub-division to the State Commissioner. His letter contained the following paragraphs:-

> 3. You are required to state the written agreement for the surrender of the portion of the land provided for the petrol service station and to re-issue a lease title for thirty years. This is a policy of the Government to allocate the area for a petrol and service station.
>
> 4. Upon your due compliance of the conditions herein stated your application shall then be forwarded to the state authority for their consideration.

This letter, a copy of which was sent to the State Commissioner, was a plain intimation that approval would not be granted to a sub-division resulting in a continuation of the title in perpetuity of Shell to the petrol filling station site.

By a letter dated 1 November 1973 Shell wrote to the Collector saying *inter alia*:

> We note that we are requested to agree to surrender the portion earmarked for the petrol station and accept a thirty-year lease thereof before our application for sub-division can be considered by the State authority. We write to enquire whether you would be prepared to reconsider this requirement so that a title in continuity could be issued in respect of both portions of lot 162 on the completion of sub-division.

A copy of this letter was also forwarded to the State Commissioner.

By a letter dated 10 November 1973 the Collector regretted to inform Shell that "your request for a title in continuation of the said petrol station site could not be considered as it is against the policy of the Government".

Thereupon Shell's solicitors wrote to the appellants on 27 November 1973 stating that it had become legally impossible to sub-divide the land in accordance with the agreement and refunding the appellants' earnest money.

On 11 July 1980 Wan Hamzah J sitting in the High Court in Malaya granted the appellants an order for specific performance of the agreement dated 29 December 1972. On 24 March 1982 the Federal Court of Malaysia (Lee Hun Hoe CJ Borneo Abdul Hamid FJ and E. Abdoolcader J) set aside the order of the High Court. The appellants appeal to His Majesty the Yang di-Pertuan Agong with leave.

Shell's case is that it was not legally possible to sub-divide the land without the approval of the State Commissioner. That approval could not be obtained because the State authorities were only prepared to grant a thirty-year title to the site of the petrol filling station. Therefore the agreement was at an end on 27 November 1973 when Shell returned the earnest money to the appellants. Their Lordships agree.

On behalf of the appellants, Mr. Millett argued with persistence for over a day first that Shell were not entitled to treat the agreement as at an end on 27 November 1973 and secondly that it was legally possible on 27 November 1973 to sub-divide the land in accordance with the agreement.

On 27 November 1973 the application for sub-division had only been considered by the Collector. It is said that Shell should have insisted that the Collector refer the application to the State Commissioner but it is clear from the correspondence that it would have been a waste of time for Shell to insist on the application being referred to the State Commissioner. There is no reason to doubt and every reason to believe that the Collector was accurate when he said that the policy of the Government would not permit a sub-division unless Shell surrendered their title in perpetuity to the petrol filling station and accepted in exchange a thirty-year term. Copies of the correspondence were sent to the State Commissioner, who did not repudiate the policy statement communicated to Shell by the Collector.

Then it is said on behalf of the appellants that sub-division was legally possible. Shell could have accepted the conditions sought to be imposed by the Collector and could have surrendered their title in perpetuity in exchange for a thirty-year lease. But that would not have been a sub-division of the land in accordance with the terms of the agreement because Clause 2 required that both parts of the original land should be issued with separate documents of title in continuation. In order to comply with the agreement the sub-division had to take the form of an issue to the appellants of a title in perpetuity to the land comprised in the agreement and the issue to Shell of a title in perpetuity to the petrol filling site. This result could not be achieved. Nevertheless it is said that sub-division was still legally possible. Shell could have closed down the petrol filling station and would then not have been obliged to surrender their title in perpetuity for a thirty-year term.

By these arguments the appellants are seeking to impose on Shell new conditions which are inconsistent both with the spirit and the letter of the agreement. Shell would never have agreed to enter into a contract to sell part of the land to the appellants on terms that Shell would surrender their title in perpetuity for a thirty-year term or would close down the petrol filling station if either of these courses became necessary in order to obtain sub-division. The suggestion that there can be derived from the agreement some implied obligations on Shell to this effect or that the Court should impose these obligations on Shell is in the opinion of their Lordships untenable.

Finally the appellants argued that the Collector and the State Commissioner had no power to withhold approval of the sub-division of the land; it was their duty to grant approval. They had no right to demand and were exceeding or abusing their powers in demanding that Shell should surrender their title in perpetuity and accept a thirty-year term. It is now clear that indeed the Government had no power to pursue a policy of insisting that a title in perpetuity to a petrol filling station should be surrendered in return for a thirty-year term. That appears from the decision of the Federal Court in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise* [1979] 1 MLJ 135. But there is nothing in the agreement dated

29 December 1972 which obliged Shell to do more than make the necessary application for sub-division. Their Lordships decline to imply in the agreement or to impose an obligation on the part of Shell to bring proceedings. Such an obligation whether express or implied would be thoroughly unreasonable.

In the result their Lordships agree with the Federal Court of Malaysia and will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed with costs.

Also found at [1986] 2 CLJ 104